STRAITS SETTLEMENTS REPORTS.

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[COURT OF APPEAL]

McELWAINE, C.J. (S.S.), POYSER, C.J. (F.M.S.) & CAREY, J.

March 12, 1941.

IN RE ESTATE DUTY ORDINANCE, 1929, S. 36.

IN RE THE ESTATE OF T.M.R.M. VENGADASALAM CHETTIAR DECEASED.

[PENANG APPEAL No. 1 of 1940]

Estate Duty Ordinance s. 36 sub-s. 1—Property of joint Hindu family—Onus of proof that property is property of joint Hindu family.

The Commissioner of Estate Duties appealed from the judgment of Aitken, J. reported in 1940 S.S.L.R. 52, 9 M.L.J. 155 on two grounds—first, that the executor was estopped from denying that the testator as a member of a joint Hindu family had power to dispose of the family assets, and second, that the executor had not discharged the onus of proving that the only asset of the deceased was an asset of a joint Hindu family and was not the testator's property of which he had a power of disposition by will.

Held, on appeal, first, that there was no estoppel; second, (McElwaine, C.J. dissenting) that the executor had not discharged the onus of proof.

Cases referred to:-

(1) *Lissenden v. C. A. V. Bosch* 1940 A.C. 417.

(2) *In re Estate of R.M.A.T.M. Meyappa Chettiar* 10 M.L.J. 131.

(3) *Periyacaruppan Chettiar v. The Commissioner of Stamps,* Ceylon case decided in 1936.

APPEAL.

F. G. Pooley for appellant.

R. D. Hume for respondent.

The facts and arguments sufficiently appear from the judgments.

Cur. Adv. Vult.

McElwaine, C.J. (S.S.)—It is not explained why this litigation is intituled "in the matter of the Estate Duty Ordinance 1929" as this Ordinance was repealed nearly two years before the death of the deceased by The Estate Duty Ordinance (Cap. 227). See s. 10 sub-s. 3 of the Revised Edition of the Laws Ordinances.

This is an appeal from the judgment of Aitken, J. in which he held that the estate of the late T.M. R.M. Vengadasalam in this Colony was joint family property in which the deceased had only an one-third interest, the remaining two thirds being the property of his two minor sons.

The deceased by his last will dated the 17th February 1938 appointed Subramaniam Chettiar "trustee, manager and administrator of my family and of my estate and effects after my death." In his petition for probate Subramaniam described himself as sole executor and this description is not challenged.

In the will the testator stated that he had inherited very little of ancestral property and that that little had been used up towards family maintenance and that all the property disposed of by the will had been acquired and developed personally by himself and that they belonged exclusively to the testator.

The testator had two sons, both minors. The elder Arunasalam was blind and unable "to take up the management of the family" and on this account he appointed Subramaniam his executor.

The testator having directed that the marriage expenses of the blind son should be paid out of the estate directed the executor to manage the estate until the second son Somasundaram attained his majority when a partition should be effected between the two sons in equal shares and the share of Somasundaram handed over to him. The share of the elder son was not to be handed over to him. As regards this share the executor and the younger son were appointed joint trustees to carry on its management. "Should the said Arunasalam have any male issue through his wife married from our community, all properties and funds relating to the said Arunasalam's share shall be handed over to such male issue upon his/their attaining majority. Until so handing over the said trustees shall manage Arunasalam's share for his benefit."

The executor filed an estate duty affidavit alleging that the only property of the deceased passing on his death was one-third of the half share in the assets of the firm M.R.M.A. of which the deceased was a partner. The Commissioner of Estate Duties held that the deceased was sole proprietor of the half share and assessed the Estate Duty payable in the sum of $4,339.05 plus $295.18 interest which sum the executor paid under protest. He petitioned the Court alleging that it was ancestral property and claimed that the Estate Duty payable was $1,446.35 and he claimed that $2,983.70 together with the interest paid in respect thereof should be repaid to the executor with interest thereon.

The learned Judge gave judgment for the petitioner for $2,893.70 and $211.67 with interest at 6% from 22nd July, 1939 until repayment and the taxed costs of the Petition.

The Commissioner of Estate Duties now appeals on two grounds (1) that the petitioner was estopped from denying that any property passed under the will under which he claimed to be executor,—that he could not approbate and reprobate; (2) that the Judge was wrong in holding that the petitioner had discharged the onus of proving that the only asset of the estate of the said T.M.R.M. Vengadasalam was an asset of a joint Hindu family.

The appellant says that by taking out probate the petitioner asked the Court for a title to administer the property disposed of by the will and that he cannot now be heard to say that the testator could not dispose of any of that property.

In my opinion this point fails. The doctrine of approbation and reprobation is, as Viscount Maugham pointed out in *Lissenden v. C. A. V. Bosch Ltd.*[1], the Scottish equivalent of the English doctrine of election which forbids one to take an advantage under a will, deed or judgment and at the same time to repudiate it. "You cannot accept and reject the same instrument."

The executor (respondent) is not seeking to accept and reject the will. He does not allege that the will was not properly executed or that there was any circumstance indicating that the testator was not capable of making a will.

He is an executor and trustee appointed by the will and he does not disclaim being such. He is primarily the person to swear the Estate Duty Affidavit and I see no reason why an executor who has gone into his testator's affairs should not be allowed to swear that the testator's estate is unable to pay the legacies bequeathed or that the testator was insolvent or had no property to bequeath if such was in fact the case.

There remains the second point, did the respondent discharge the onus of proof which was on him of proving that this was Hindu Joint property?

The only evidence was on affidavit.

It is not disputed:—

1. That the testator was the adopted son of T.M.R.M. Ramanathan who had no other children.
2. That Ramanathan on the 22nd July 1900 entered into partnership with one Vengadasalam Chettiar under the Vilasam M.R.M.A.
3. That Ramanathan's share in M.R.M.A. was a half share, and that this half share was held by the testator after Ramanathan's death in 1903.

The only question is did the testator acquire Ramanathan's interest in M.R.M.A. as ancestral property by right of his survivorship. The testator and Ramanathan appear both to have been domiciled in Southern India.

The petitioner, a nephew of the testator, swore that the testator acquired Ramanathan's interest by inheritance as family property. Subramanian Chettiar, a man of 57 years of age who was born a few miles away from the family house of T.M.R.M. and had known the family all his life, swore that the testator acquired the interest of Ramanathan as being the only adopted son and that all the property possessed by the testator was ancestral property or acquired by purchase out of ancestral property.

This man Subramanian was for some time attorney for K.R.R.M. a firm in which the testator was a partner. In my opinion the statements of these men, one a near relative and the other an old friend and neighbour, cannot lightly be disregarded. They were not cross-examined on their affidavits and from their connections with the testator and his family they may be expected to have knowledge of his affairs. The testator himself says that he inherited very little family property, meaning that he did inherit some but said that it had all been used up in family maintenance.

The petitioner in his affidavit says that the testator had a son Meyappa with whom he quarrelled and "they divided about the year 1912." I think this means that the family property was divided and that Meyappa took his portion and left the family. This indicates that the testator's property was joint family property nine years after the death of Ramanathan.

There is no evidence that Ramanathan disposed of his interest by deed or will or gift to the testator or that the testator possessed his adopted father's interest before the latter's death. The testator himself says he inherited a little, and there is certainly no evidence that he acquired this interest in any other way than by inheritance. The testator also says that the elder son was unable "to take up the management of the family."

In his affidavit the petitioner tells of a conversation he had with the testator when the latter asked him to be executor of the will he proposed to make.

The petitioner told the testator that it was unusual for members of a joint Hindu family to make wills and the testator replied that he was not going to deprive his sons of the family property. The testator then proceeded to give a very reasonable explanation as to why he wanted to make a will. Both children were minors and one was blind and he wanted somebody to look after the family business on their behalf.

Set off against this evidence is the affidavit of an officer of the Estate Duty Department who examined the books of the firms M.R.M.A., N.A.V. and T.M.R.M. and found that in none of these books was there any indication that the testator's sons were part owners or that the testator held his share in trust for his sons "in accordance with the usual practice."

It may well be that it is the usual practice to show in a firm's books of account the members of a joint family entitled to a share of the assets and profits of the firm when those members are adults to whom these shares are paid over but I should like some more evidence that the same practice obtains when all the members are the infant children of a partner in the firm.

To my mind the evidence indicates that the testator inherited a nucleus of ancestral property and that his final wealth grew from this nucleus.

I think the petitioner discharged the onus that was upon him and that the trial Judge came to a right conclusion.

I would dismiss the appeal with costs of the appeal but as this litigation has been caused primarily by the assertions in the will, I would give no costs to the petitioner in the Court below.

As the majority of the Court considers that the petitioner did not discharge the onus that was upon him the appeal is allowed with costs.

Poyser, C.J. (F.M.S.)—The point to be determined in this appeal is whether the learned trial Judge was correct in holding that the property of the deceased was Hindu joint-family property, and that consequently the Commissioner of Estate Duties had claimed an excessive amount as estate duty.

The only asset of the deceased in the Straits Settlements was a half share in a money-lending firm at Penang, doing business under the vilasam of M.R.M.A. It was established in the lower Court that the testator was:—

> "the adopted son of the late T.M.R.M. Ramanathan Chettiar, who adopted the testator because he had no lawful and natural son of his own;
>
> that the late T.M.R.M. Ramanathan Chettiar was carrying on a money-lending business in Penang, in partnership with one N.A. Vengadasalam Chettiar and under the vilasam of M.R.M.A. at any rate so long ago as the year 1900 and possibly for several years before that date;
>
> that the late T.M.R.M. Ramanathan Chettiar's share in the M.R.M.A. money-lending business was a one-half share; and
>
> that this one-half share in the M.R.M.A. business somehow or other passed to the testator."

Ramanathan Chettiar died about the year 1903, and the case for the petitioner was that the deceased as his adopted and only son acquired the share in the business of M.R.M.A. by right of survivorship in accordance with Hindu Law. It was further argued for the petitioner that the deceased was, at the time of his death, a member of an undivided Hindu joint family comprised of himself and his two sons, and consequently the only property passing on his death was a one-third of one-half share in the business of M.R.M.A.

There appears to be no doubt that the deceased was a member of a joint Hindu family, but in regard to the half-share he stated in his will as follows:—

> "I own an one-half share in M.R.M.A. firm of Penang and an one-half share in K.R.R.M. firm of Kuala Lumpur. Besides these, there are the share capital in these two firms, advances and Thavanai moneys held in favour of myself and V.A.R. and also the assets and liabilities as in the schedule attached hereto. All these having been acquired and developed personally by me, they belong exclusively to me."

The petitioner, however, in his petition stated that he knew that all the deceased's property was acquired by funds out of ancestral property, and that the passage in the deceased's will above referred to was incorrect. The petition was supported by two affidavits.

The only affidavit filed on behalf of the Commissioner of Estate Duties was that of A. R. Nayar, an Assistant Probate Examiner. In such affidavit he stated:—

> "I say that if the half-share shown as belonging to the deceased in the firm of M.R.M.A. had been held by him jointly with his said sons or by him in trust for his said sons by reason of the deceased and his said sons constituting a joint Hindu family then the names of the said sons would have appeared in the said books as part owners in accordance with the usual practice."

The learned Judge, with some hesitation, came to the conclusion that the testator inherited the half share in the M.R.M.A. firm from his adopted father, and

held, disagreeing with the decision of Gordon-Smith, J. in the case of *In re Estate of R.M.A.T.M. Meyappa Chettiar*,[2], that the deceased was not a trustee for himself and his sons, and that accordingly the whole of the half share in question could not be regarded as having passed on his death.

The grounds of appeal were:—

> "The learned Judge was wrong in holding that the petitioner could, without any explanation for such conduct, prove the will of T.M.R.M. Vengadasalam Chettiar and contend in these proceedings and in his capacity as executor that the facts were such that the will was a nullity and should have held that the petitioner could not be allowed to approbate and reprobate the said will and was estopped from reprobating it.
>
> "The learned Judge was wrong in holding that the petitioner had discharged the onus of proving that the only asset of the estate of the said T.M.R.M. Vengadasalam Chettiar was an asset of a joint Hindu family and was not the testator's property of which he had a power of disposition by will. The evidence adduced by the petitioner was in fact insufficient for the purpose."

(There was a third ground of appeal, but it was dropped). As regards the first ground of appeal, there was considerable substance in Mr. Pooley's argument, but I do not agree that the petitioner was estopped from setting up the claim he did. No doubt he would be estopped from reprobating the will by alleging that it was not properly executed, or similar allegations, but I think he was not estopped from raising the question he did. As, however, I am of the opinion that the appeal succeeds on the second ground, it is unnecessary to deal in detail with this point or consider the various authorities that were cited.

As regards the second ground of appeal, I do not consider that the petitioner discharged the onus that was on him. As was held in the Ceylon case of *Periyacaruppan Chettiar v. The Commissioner of Stamps*[3]:

> "The conduct of the deceased member of a joint Hindu family and his surviving heirs can be taken into account in considering a claim that the property standing in the name of the deceased is joint property."

No doubt the statement in the deceased's will that this half share was his own property is not conclusive evidence that it was, but such statement is certainly conduct of the deceased that should be taken into account in considering this claim. The other conduct of the deceased to be considered is that the will established that the deceased had no intention of benefitting strangers at the expense of his own family, and further, by its terms, rendered the whole of his estate liable to estate duty, and the deceased by reason of his occupation would be familiar with the law as to estate duty. As against the conduct of the deceased, there is only the statement of the petitioner and that of A.S.P. Subramaniam Chettiar, that they knew the deceased's property was ancestral property, but they gave no satisfactory reasons for such knowledge.

In view of the fact that it is entirely a matter of conjecture how the deceased became possessed of this half share, no documentary evidence of any sort being produced to support the claim, I am of opinion that the petitioner did not discharge the onus that was on him, and I would allow this appeal with costs here and below.

Carey, J.—This is an appeal by the Commissioner of Estate Duties of the Straits Settlements against the judgment of Aitken, J. in the High Court, Penang, wherein he held that the estate duty payable on the property passing on the death of the testator T.M.R.M. Vengadasalam Chettiar, deceased, was to be assessed on one-sixth of the value of a business styled M.R.M.A. carrying on as moneylenders in Penang, in which according to the executor-petitioner, the deceased testator, a member of a joint Hindu family, owned a half share in conjoint family ownership with his two sons.

The original assessment of the Estate Duty Commissioner was on the half share and the petitioner, the executor of the testator, successfully applied to the High Court for determination of the duty.

The first ground of appeal is:—

> "The learned Judge was wrong in holding that the petitioner could, without any explanation for such conduct, prove the will of T.M.R.M. Vengadasalam Chettiar and contend in these proceedings and in his capacity as executor that the facts were such that the will was a nullity and should have held that the petitioner could not be allowed to approbate and reprobate the said will and was estopped from reprobating it."

It seems to me that this ground is ill-conceived. The executor does not attempt to contest the validity of the will as such, but merely says, in effect, that, "though the will, as such, is in order, I am satisfied that the testator purported to deal therein with the property which he, as a member of a joint Hindu family, had no power to dispose of.

The second and remaining ground of appeal is:—

> "The learned Judge was wrong in holding that the petitioner had discharged the onus of proving that the only asset of the estate of the said T.M. R.M. Vengadasalam Chettiar was an asset of a joint Hindu family and was not the testator's property of which he had a power of disposition by will. The evidence adduced by the petitioner was in fact insufficient for the purpose."

Now the only evidence as to the partnership business of M.R.M.A. being jointly owned by the testator and one N.A. Vengadasalam Chettiar is an affidavit of the executor-petitioner and one of another person. It is alleged in these affidavits that the testator, as adopted only son of one Ramanathan Chettiar deceased, acquired the half share interest of his adoptive father in the business of M.R.M.A. on the latter's death. The books of the firm show a half share of the business in T.M.R.M. and a half share in N.A.V., which is the style or vilasam of the other partnership interest of N.A. Vengadasalam Chettiar, who also is deceased.

It is not questioned that, according to Hindu Law, if the half share in the M.R.M.A. business is joint Hindu family property, on the death of the testator it became the joint property of his two sons, who from birth had an interest in the property equal to their parent's, so that only one-third of it would actually pass on the parent's death.

The evidence as to how the testator acquired the interest in the business of M.R.M.A. is in the two affidavits. In the first that of the petitioner-executor, the latter says that the testator, his uncle, was adopted by T.M.R.M. Ramanathan Chettiar who built the family house of T.M.R.M. in Karaikudi, Southern India, wherein the testator lived together with his two sons as members of a joint Hindu family; that the family of T.M.R.M. had an interest in the money-lending business of K.R.R.M. at Kuala Lumpur of which, in 1937, the deponent was appointed manager by virtue of a Power of Attorney given to him by the testator; that the only assets of the testator in the Colony consisted of a share in the money-lending firm of M.R.M.A. carried on at Penang; that this firm was founded on the 22nd July 1900 by Ramanathan Chettiar, who adopted the testator, and Vengadasalam Chettiar each of whom held equal shares in the firm; that Ramanathan Chettiar died in about the year 1903 and thereupon the half share in the firm was acquired by the testator by inheritance as ancestral property.

In the second affidavit one Subramanian Chettiar says he was born a few miles away from the family house of T.M.R.M. in South India and that he has known that family all his fifty-seven years of life. He says that T.M.R.M. Ramanathan Chettiar was an only son and, having no sons of his own, adopted the testator. That prior to the year 1900 he, the deponent, was in Penang in a money-lending firm; that he knows the testator and his friend one N.A. Vengadasalam Chettiar carried on business in partnership under the style of M.R.M.A.; that later the testator carried on business at Kuala Lumpur in partnership under the vilasam of K.R.R.M. and that he, the deponent, was for sometime acting as attorney of that firm; that Ramanathan Chettiar died about 34 or 35 years ago and after his death the testator acquired the whole interest of Ramanathan Chettiar as being the only adopted son; that he knows all the property possessed by the testator was ancestral property or acquired by purchase out of ancestral property.

It may be noted that neither deponent sets out his means of knowledge other than what may be inferred from the other allegations in the respective affidavits.

As against this there is the recital in the will of the testator as follows:—

> "I inherited very little of ancestral property which had been used up towards family maintenance. Therefore, from an early age I had been working as a salaried agent earning salaries and bonuses in far-off lands. By dint of my own exertions I entered into partnership with other persons, established firms and did business, had money-lending transactions bought and sold properties in India and abroad, brought up a family and am now in the enjoyment (of all these). At present I am the owner of the undermentioned immovable properties.
>
> One big house in M.M. Street at Karaikudi with gardens attached to it, one house in S.M. Street, one big compound and site adjoining Parayan Kanmoi and some rice fields in Manapparai. I own an one-half share in "M.R.M.A." Firm of Penang and an one-half share in "K.R.R.M." firm of Kuala Lumpur. Besides these, there are the share capital in these two Firms, advances and "Thavanai" moneys held in favour of myself and "V.A.R." and also the assets and liabilities as in the schedule attached hereto. All these having been acquired and developed personally by me, they belong exclusively to me."

That recital affords no proof of the facts therein stated, but it certainly would appear strange that the testator should go out of his way to insert those statements if they were untrue.

Then there is the affidavit of an Assistant Probate Examiner employed in the office of the Commissioner of Estate Duties which, shortly, states that there is no mention of the names of the two sons of the testator in the books of the firm of M.R.M.A. or N.A.V. and that had the half share in M.R.M.A. belonged to the testator and his two sons jointly as constituting a joint Hindu family the names of the sons would have appeared in the books as part owners in accordance with the usual practice. He adds that no books were produced relating to any joint family business of the mark T.M.R.M. The books

of M.R.M.A. showed that T.M.R.M. (not "the deceased" as mistakenly stated in the affidavit) owned a half share in that business.

The appellant says that the evidence adduced by the petitioner was insufficient to discharge the onus imposed upon him of proving that the asset in question was an asset of a joint Hindu family and was not the testator's of which he had power to dispose by will.

Admittedly, an adopted son, according to Hindu law, is in precisely the same position in the family as a natural and lawful son, and if the testator did inherit the interest of his father (by adoption) in the firm M.R.M.A., it would seem the Hindu law is, that such interest becomes joint family property and, on the testator having sons, they each acquired a joint interest equal to the testator's. There is no proof apart from the general statements in the two affidavits as to how the testator acquired the half share interest in the business of M.R.M.A. The learned judge of first instance found that this one half share "somehow or other passed to the testator", and it was partly on this finding of fact he based his decision.

The question is, is such finding sufficient, when, according to the same learned judge's statement of the Hindu Law, there are ways of acquiring property under Hindu Law whereby the quality of being family property does not attach so as to preclude the party acquiring it from disposing of it? Unless the half share in the business of M.R.M.A. was ancestral property, as to which there is no evidence, one way or the other, there was no reason why its owner T.M.R.M. Ramanathan Chettiar should not dispose of it. He may have sold it to the testator, as the testator's will suggests. If the testator inherited the half share from his adoptive father, there is no more to be said about the matter, but the learned judge merely found that it "passed somehow or other" to the testator and he did not find that in the hands of Ramanathan Chettiar it was ancestral property or joint family property. For this reason I think the appeal should be allowed with costs.

Appeal allowed.

Solicitors for appellants—*Presgrave and Matthews.*

Solicitors for respondents—*Hogan, Adams and Allan.*

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J.

May 3, 1941.

A.L.M.M. MUTHUKARUPPAN CHETTIAR

v.

HAJI IBRAHIM.

[SINGAPORE DISTRICT COURT APPEAL No. 5 of 1940]

The Increase of Rent (Restriction) (Amendment) Ordinance 1940,—Summons claiming possession of land —Definition of the word "land"—Length of notice to quit.

An attap house built by a ground tenant is usually not a fixture; it is the property of the tenant who is entitled to remove it. A month's notice to quit is usually sufficient to terminate a monthly tenancy of a dwelling or of an ordinary shop.

Prior to the coming into force of Ordinance 40 of 1940 (The Increase of Rent (Restriction) (Amendment) Ordinance 1940) no permission of the Rent Assessment Board under S. 8 of the Increase of Rent (Restriction) Ordinance 1939 was necessary before a landlord could eject or apply to any Court to eject a tenant of land only, even though the tenant had built an attap house upon such land. So far as concerns such a case, "land" is not "premises" as defined by the Ordinance as unamended. (This definition was altered by Ordinance No. 40 of 1940).

Cases referred to:—

(1) *Parry v. Hazell* 1 Esp. 93.
(2) *Lee Ah Toke v. Chan Ah Fat* 2 S.S.L.R. 20.
(3) *Tay Boon Huat v. Kulsam Bee* 13 S.S.L.R. 51.
(4) *Martin v. Watts* 7 T.L.R. 83.
(5) *R. v. Swaine* 4 M.L.J. 276; (1935) S.S.L.R. 228.
(6) *Colonial Sugar Refining Company v. Irving* (1905) A.C. 369.
(7) *Hitchcock v. Way* 2 Ad. & E. 943.
(8) *In re Joseph Suche & Co., Ltd.* 1 Ch. D. 48.
(9) *Quilter v. Mapleson* 9 Q.B.D. 672.

MAGISTRATE'S APPEAL.

Cobbett for appellant.

Demuth for respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

McElwaine, C.J.—This is an appeal from the decision of the District Judge (Civil) dismissing the appellant's summons in which he asked for possession